

STATE OF MICHIGAN
COURT OF APPEALS

RICK HIGA and DANA HIGA,

Plaintiffs/Counter-Defendants-
Appellees,

v

KEY GROUP, INC., MARLENE A. CARROLL,
HIDDEN RIDGE CONDOMINIUM
ASSOCIATION, and NATIONAL COMMUNITY
ACQUISITIONS, L.L.C.,

Defendants,

and

DEARBORN FEDERAL SAVINGS BANK,

Defendant/Counter-Plaintiff-
Appellant.

UNPUBLISHED

April 8, 2014

No. 313283

Wayne Circuit Court

LC No. 12-002581-CZ

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant/Counter-plaintiff, Dearborn Federal Savings Bank (hereinafter “Dearborn Federal”), appeals as of right an order granting in part and denying in part summary disposition to Dearborn Federal, and entering partial judgment in favor of plaintiff/counter-defendants (hereinafter “plaintiffs”). We affirm in part and reverse in part.

I. STANDARD OF REVIEW

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10). “This Court reviews de novo a trial court’s decision on a motion for summary disposition.” *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008).

A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Joseph v Auto Club Ins Ass’n*, 491 Mich 200, 206; 815 NW2d 412 (2012). In reviewing a grant of summary disposition under MCR 2.116(C)(10), this Court considers the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Sallie v Fifth Third Bank*, 297 Mich App 115, 117-118; 824 NW2d 238 (2012). Summary disposition is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

II. SUBORDINATION AGREEMENT

Defendant first contends that the trial court erred in finding that the subordination agreement between the parties regarding the Sycamore property was unenforceable. We agree.

MCL 565.391 provides, in pertinent part:

When any mortgagee named in any mortgage of property within this state, or the party or parties to whom such mortgage has been properly assigned of record, desire to waive the priority of said mortgage in favor of any other lien or mortgage, the holder thereof may in writing on said mortgage, or by separate instrument duly acknowledged and witnessed in the same manner as is provided for deeds and other instruments for the transfer of an interest in real estate, waive the priority of said mortgage in favor of any other mortgage or lien If said waiver be a separate instrument, it shall be recorded in the same manner provided for the recording of discharges of mortgages, and the recorder shall be entitled to the same fees for recording waivers of priority as are charged for assignments and discharges of mortgages.

In the absence of an express statement of law to the contrary, subordination agreements are generally construed according to contract principles. See *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 131; 602 NW2d 390 (1999) (stating that in the absence of any directly controlling UCC provisions, the scope and effect of a subordination agreement regarding collateral is to be construed according to the laws of contract interpretation). The goal of contract interpretation is to ascertain and enforce the intent of the parties. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). “A contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). Clear and unambiguous contractual language must be enforced as written. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527; 791 NW2d 724 (2010).

An ambiguity may be either patent or latent. *Shay*, 487 Mich at 667. Parol evidence is inadmissible to prove a patent ambiguity because a patent ambiguity, by its very nature, is evident on the face of the contract. *Id.* Parol evidence may be used to show a latent ambiguity, which the Supreme Court has defined as “one ‘that does not readily appear in the language of a document, but instead arises from a collateral matter when the document’s terms are applied or executed.’” Because ‘the detection of a latent ambiguity requires a consideration of factors outside the instrument itself, extrinsic evidence is obviously admissible to prove the existence of

the ambiguity, as well as to resolve any ambiguity proven to exist.” *Id.* at 668, quoting *Grosse Pointe Park v Mich Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005).

The subordination agreement at issue provides: “[Plaintiffs] agree to the subordination of the senior position of their lien to the Mortgage dated February 1, 2006.” While not patently ambiguous, once it becomes clear that the mortgage dated February 1, 2006, is plaintiffs’ own mortgage on the Sycamore property, a latent ambiguity is arguably shown. Therefore, parol evidence is admissible to both show the existence of such an ambiguity and to resolve the ambiguity. *Id.*

Attached to its motion for summary disposition, Dearborn Federal included deposition testimony of plaintiff, Rick Higa, in which he affirmatively stated that he knew that one purpose of the subordination agreement was to keep plaintiffs’ in second position in the order of mortgage priorities. Further, the vice president of Dearborn Federal stated in an affidavit that the subordination agreements were intended to subordinate plaintiffs’ mortgages to Dearborn Federal’s mortgage interests. The parties to the agreements agreed that one of the purposes of the agreements was to have plaintiffs’ interests in the properties remain in second priority. Therefore, this parol evidence is sufficient to show that the subordination agreement pertaining to the Sycamore property was latently ambiguous, as well as showing that the intent of the parties was to place Dearborn Federal’s interest in a superior position to plaintiffs’ interests. See *id.*

Plaintiffs argue that Dearborn Federal’s contention that the subordination agreement should be construed using contract law ignores one of the primary purposes of the recording statutes: notice. As plaintiffs noted, a recorded waiver of priority of a mortgage is “constructive notice thereof to all persons dealing with the mortgage.” MCL 565.391. In this case, the agreement was titled, in all capital letters at the top of the document, “SUBORDINATION AGREEMENT.” It cannot be argued that the agreement, which neither party disputes was properly recorded, is insufficient to convey the existence of an outstanding property interest to anyone who is searching through the Register of Deeds. As plaintiffs contended, “the constructive notice imported by the record of an instrument is strictly limited to that which is set forth on its face.” *Savidge v Seager*, 175 Mich 47, 55; 140 NW 951 (1913). In this case, the instrument at issue, the subordination agreement, was clearly titled to put any person searching for the property interests pertaining to the Sycamore property on notice. Plaintiffs’ argument, that the agreement fails to put the public on notice regarding an outstanding property interests of the Sycamore property, is without merit. Therefore, the trial court erred in holding that the subordination agreement pertaining to the Sycamore property was ineffective in placing Dearborn Federal’s mortgage interests in priority over plaintiffs’ interests because the intent of the parties shows that the subordination agreement was meant to keep plaintiffs interests in second position, behind Dearborn Federal.

III. EQUITABLE SUBROGATION

Dearborn Federal next contends that, even if the subordination agreement was insufficient to give it priority, the trial court should have applied the doctrine of equitable subrogation and still have found that Dearborn Federal’s interests had priority. Because the

subordination agreement was sufficient to place Dearborn Federal's interests in priority, we need not address this issue.

Affirmed in part, reversed in part as to the Sycamore property and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/Cynthia Diane Stephens

/s/ Henry William Saad

/s/ Mark T. Boonstra